



Santa Clara Law Review

Volume 17 | Number 2

Article 5

1-1-1977

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Recommended Citation

Peggy Springgay, Comment, *The Age Discrimination in Employment Act: New Incentive for Private Enforcement*, 17 SANTA CLARA L. REV. 405 (1977).

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COMMENTS

THE AGE DISCRIMINATION IN EMPLOYMENT ACT: NEW INCENTIVE FOR PRIVATE ENFORCEMENT

INTRODUCTION

When the Age Discrimination in Employment Act of 1967 (ADEA)¹ was adopted, Congress was optimistic about the role that the legislation would play in eliminating a serious problem faced by many older Americans. The purpose of the Act is exemplary. The intention of Congress was "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."² Unfortunately, the expectations of Congress have not been realized. In spite of the federal law, discrimination in employment based on age is still prevalent, and there are indications that it is increasing.³

A recent decision, however, presents hope for an increase in the number of private suits to enforce the ADEA. In November of 1975, a federal district court in New Jersey ruled that an employee unlawfully forced into retirement could recover damages for pain and suffering under the ADEA.⁴ *Rogers v. Exxon Research & Engineering Co.*⁵ is the first reported case to make such an award under the Act.⁶ In doing so, the court has provided redress for one of the most harmful results of age discrimination, a result clearly recognized by Congress when the legislation was proposed and adopted.⁷ The *Rogers* court's authorization of the award of damages reflects an awareness that the physiological and psychological damage to the victim of age discrimination is often greater than his out-of-pocket loss.

This comment discusses the appropriateness of compensation for pain and suffering under the ADEA, and the impact such awards could have on the enforcement of the Act. After

1. 29 U.S.C. § 621 *et seq.* (1970).

2. *Id.* § 621(b).

3. Note, *Discrimination against the Elderly: A Prospectus of the Problem*, 7 SUFFOLK U.L. REV. 917, 922 (1973); see note 32 *infra*.

4. *Rogers v. Exxon Research & Eng'r Co.*, 404 F. Supp. 324 (D.N.J. 1975).

5. *Id.*

6. *Id.* at 331.

7. See notes 85-91 and accompanying text *infra*.

an overview of the ADEA as background, the comment assesses the enforcement of the Act to date, considers the obstacles to private suits, and discusses why an incentive is needed for private litigation. The *Rogers* decision, recognizing compensatory damages as an appropriate award, is then examined. Since ADEA litigation is only now entering the recovery stage,⁸ support for the result in *Rogers* is drawn from the legislative history and the language of the Act, a comparison with damages under Title VII of the Civil Rights Act of 1964,⁹ and an examination of the judicial treatment of damages in other discrimination contexts. The prospect of adequate compensation for injury under the Act should provide litigants with the much-needed incentive to pursue their legal rights, and could give new force to the ADEA.¹⁰

THE AGE DISCRIMINATION IN EMPLOYMENT ACT

The Age Discrimination in Employment Act¹¹ makes it unlawful for an employer to discriminate against an employee or applicant who is between forty and sixty-five years of age¹² on the basis of that individual's age. Specifically, an employer may not discharge or refuse to hire any such individual because of his age, nor may the employer discriminate against him with respect to compensation, terms, conditions, or privileges of his employment.¹³ The prohibitions of the Act also extend to em-

8. The term "recovery stage" refers to that phase of litigation in which the court must interpret and implement the remedial provisions of the Act. Earlier cases under the ADEA were concerned largely with procedure and the scope of the Act's prohibitions. The recovery stage is reached only after the complainant has met the procedural requirements and has established a violation of the Act's provisions. See *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1380 (5th Cir. 1974); *Levien, The Age Discrimination in Employment Act: Statutory Requirements and Recent Developments*, 13 Duq. L. Rev. 227, 246 (1974).

9. 42 U.S.C. § 2000e et seq. (1970).

10. The most widely recognized problem with the ADEA is the scope of its protection, which ends at age sixty-five. This aspect of the Act is not dealt with in this comment. For a treatment of the problem of the Act's age limitations, see, e.g., Comment, *Mandatory Retirement—A Vehicle for Age Discrimination*, 51 CHI.-KENT L. REV. 116 (1974); Comment, *Discrimination Against the Elderly: A Prospectus of the Problem*, 7 SUFFOLK U.L. REV. 917 (1973).

11. 29 U.S.C. § 621 et seq. (1970).

12. *Id.* § 631.

13. *Id.* § 623(a). That section provides, in part:

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

ployment agencies¹⁴ and to labor organizations.¹⁵

The Act provides for several fairly broad exceptions to its provisions. It is not unlawful for an employer, employment agency or labor organization to take any action otherwise prohibited, "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based upon reasonable factors other than age"¹⁶ An employer may also retire or refuse to hire an individual pursuant to the terms of a bona fide seniority system or employee benefit plan, provided that such plan or system is not a subterfuge to evade the purposes of the Act.¹⁷ Finally, an employer may always discharge or discipline any individual for good cause.¹⁸

Education of the general public was one of the means by which Congress intended to give effect to the purposes of the Act.¹⁹ The Secretary of Labor was directed to provide "an education and information program to assist employers and employees in meeting employment problems which are real and dispelling those which are illusory"²⁰ Such a program is helpful in the long run, but education alone can not succeed in achieving immediate compliance with the Act's purposes; therefore, methods of enforcement are also provided.²¹

Enforcement of the Act is left primarily to the Secretary of Labor. The Secretary has the power to make investigations, to require the keeping of necessary records, and to compel the attendance of witnesses and the production of books, papers and documents.²² It was intended by Congress "that the responsibility for enforcement, vested in the Secretary by §7 [29 U.S.C. §626], be initially and exhaustively directed through informal methods of conciliation, conference and persuasion and formal methods be applied only in the ultimate sense."²³

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age;

14. *Id.* § 623(b).

15. *Id.* § 623(c).

16. *Id.* § 623(f)(1).

17. *Id.* § 623(f)(2).

18. *Id.* § 623(f)(3).

19. *Id.* § 622.

20. [1967] U.S. CODE CONG. & AD. NEWS 2214; see 29 U.S.C. § 622 (1970).

21. 29 U.S.C. § 626 (1970).

22. *Id.* § 626(a).

23. 113 CONG. REC. 34,748 (1967); see S. REP. NO. 723, 90th Cong., 1st Sess. 5 (1967).

Formal methods of compliance were intended only if voluntary compliance could not be achieved.²⁴ Therefore, before any litigation, the informal methods provided for in the ADEA must be exhausted.²⁵

The ADEA provides for civil action by private individuals as well as by the Secretary of Labor.²⁶ In order for a private individual to bring suit under the Act, that individual must give the Secretary of Labor not less than sixty days notice of his intent to file an action.²⁷ Such sixty-day notice must be filed within time limitations set forth in the Act.²⁸ During this sixty-day period the Secretary of Labor is directed to "seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion."²⁹ Only after the sixty-day period has expired, and only if the Secretary of Labor declines to sue, may an aggrieved individual bring suit for legal or equitable relief.³⁰ If a violation of the ADEA can be proved, the aggrieved individual is entitled to "such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter"³¹

ENFORCEMENT TO DATE

In spite of the Age Discrimination in Employment Act, discrimination against older workers is still prevalent.³² Enforcement of any anti-discrimination statute is difficult, since this is an area where subtleties of conduct can make detection and proof of violations difficult. Despite the difficulty in prov-

24. S. REP. No. 723, 90th Cong., 1st Sess. 5 (1967).

25. 29 U.S.C. § 626(b) (1970) provides, in part: "Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminating practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference and persuasion."

26. *Id.* § 626(c).

27. *Id.* § 626(d).

28. *Id.*

29. *Id.*

30. *Id.* § 626(c) provides:

Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this Chapter.

31. *Id.* § 626(b).

32. The secretary of Labor reported to Congress that the Wage and Hour Division received 4717 complaints of bias in violation of the ADEA, an increase of 55% over the figure for fiscal 1974. This rise followed increases in previous years. 91 LAB. REL. REP. (BNA) 201, 218 (1976).

ing and providing remedies for violations, it can be argued that the Act, as enforced by the Secretary of Labor, has not met its potential for alleviating age discrimination.

Evaluations of the effectiveness of the Act have uniformly recognized enforcement as a problem area. Although the Act became effective on June 12, 1968, by 1970 there had been only ten court cases filed under the Act.³³ As late as December, 1971, one court was able to state that it could find only two reported cases under the ADEA.³⁴ In its evaluation of the ADEA in 1971, the White House Conference on Aging questioned whether the Act was being vigorously enforced.³⁵ The Senate's Special Committee on Aging expressed similar reservations about enforcement. In a report presented in 1972, the committee stated:

More than 2500 violations were found under the Act in fiscal year 1971 And these figures probably represent only a small portion of the infractions under the law, since many illegal practices go unreported.

Yet only 80 suits have been filed under the Act, despite the prevalence of job bias because of age.³⁶

The committee recommended an increase in funding for the Age Discrimination in Employment Act, to provide additional personnel to enforce the Act more vigorously.³⁷

A more recent study attempted to pinpoint and explain the problem in enforcing the Act.³⁸ The analysis indicates that the problem stems from a lack of emphasis on enforcement of the ADEA within the responsible division. The investigation and enforcement provisions of the ADEA follow those of the Fair Labor Standards Act, and are administered in the Wage and Hour Division, Employment Standards Administration of the Department of Labor.³⁹ The study found that enforcement

33. SENATE SPECIAL COMM. ON AGING, IMPROVING THE AGE DISCRIMINATION LAW, A WORKING PAPER, 93d Cong., 1st Sess. 2 (1973) [hereinafter cited as SEN. SPECIAL COMM., WORKING PAPER].

34. *Monroe v. Penn-Dixie Cement Corp.*, 335 F. Supp. 231, 233 n.1 (N.D. Ga. 1971).

35. Comment, *Mandatory Retirement—A Vehicle for Age Discrimination*, 51 CHI.-KENT L. REV. 116, 135 (1974).

36. SENATE SPECIAL COMM. ON AGING, DEVELOPMENTS IN AGING: 1971 AND JANUARY-MARCH 1972, S. REP. NO. 784, 92d Cong., 2d Sess. 50 (1972).

37. *Id.* at 53. Increased funding was provided in 1974, when Congress authorized appropriations of up to five million dollars. 29 U.S.C.A. § 634 (1975). At the same time, Congress expanded the coverage of the Act by expanding the definition of "employer." *Id.* § 630(b).

38. SEN. SPECIAL COMM., WORKING PAPER, *supra* note 33, at 2.

39. *Id.* at 13. See 29 U.S.C. § 626(b) (1970).

of the ADEA is only a small part of the activities of the Wage and Hour Division, which also enforces minimum wage, overtime and equal pay laws. In both staff and expenditures, the enforcement of the ADEA was found to represent less than five percent of the total for the entire Division. Considering the nationwide scope of the Act and the complexities of the law, the amount of money and man-years devoted to the enforcement of the ADEA was found to be "amazingly small."⁴⁰ Within the Wage and Hour Division, ADEA enforcement activities are vastly overshadowed by the enforcement of the more traditional minimum wage and overtime laws.⁴¹

Subsequent information provided by the Secretary of Labor indicates little change in the pattern of inadequate enforcement.⁴² The statistics provided in the Secretary's annual reports are difficult to interpret, but it is apparent that full use is not being made of the available remedies or resources. One thing is clear from the reports. There is a noticeable discrepancy between the number of violations the Department states it has found, and the number of enforcement suits brought.⁴³ The reports fail to explain this discrepancy. Recognizing the

40. SEN. SPECIAL COMM., WORKING PAPER, *supra* note 33, at 17. The report stated that the budget request for 1974 was less than half of the authorized three million dollars. Another report to the Senate showed that in 1969, 46 positions within the Division were allotted to the new program; by 1974, the number of positions had increased only to 69. SPECIAL SENATE COMM. ON AGING, DEVELOPMENTS IN AGING: 1973 AND JANUARY—MARCH 1974, S. REP. NO. 846, 93d Cong., 2d Sess. 111 (1974).

41. SEN. SPECIAL COMM., WORKING PAPER, *supra* note 33, at 17.

42. The information referred to is that provided by the Secretary of Labor in the annual reports to Congress required by section 632 of the ADEA. The reports are contained in the *Labor Relations Yearbooks*.

43. For example, in 1973, the Department found monetary violations in 217 establishments; income was restored to employees in 96 firms, but during that year only 46 suits were filed. [1974] LAB. REL. Y.B. 381. In 1974, the Department reported finding monetary violations in 277 firms, and achieving compliance with 110 firms, but only 47 suits were filed during that year. [1975] LAB. REL. Y.B. 413. In both years, non-monetary violations were also found.

The Secretary of Labor categorizes violations of the Act as either "monetary" or "non-monetary." *Id.* The latter category includes illegal advertising, refusals to hire, discharges, and promotion denials. *Id.* The damages the Secretary reports having recovered are in the monetary violation category, and it appears that damages are not even considered in the non-monetary types of violations. Not only can violations such as refusals to hire, discharges and promotion denials result in out-of-pocket loss, but discrimination in these stages of employment also can result in the type of pain and suffering documented in *Rogers*. *Rogers* itself involved illegal termination. Compensatory damages are not mentioned at all in the Secretary of Labor's reports. It appears that the emphasis is on the more traditional wage and hour problems of recovery of back or unpaid wages. The legal remedies provided by the ADEA have apparently not been sought by the Department of Labor.

scope of age discrimination, it seems incongruous that by the end of 1974, some six years after the Act became effective, only 224 suits to compel compliance had been instituted by the Secretary of Labor.⁴⁴

Based on these figures, it would seem that the effectiveness of the ADEA will be dependent in large part on the initiative of aggrieved individuals in bringing suit. Until recently, however, there had been little incentive for a private individual to pursue his complaint to its ultimate resolution in the courts.⁴⁵ Congress intended that the Secretary of Labor bear the primary responsibility for enforcement.⁴⁶ This intention is reflected in the Act's requirement of the sixty-days' notice an individual must give the Secretary before instituting suit.⁴⁷ In addition, if there is an applicable state age discrimination statute, no action may be brought under the ADEA until sixty days after state proceedings are commenced,⁴⁸ unless such proceedings have been terminated earlier.⁴⁹

Once the statutory prerequisites are met,⁵⁰ the individual may proceed with his action, but the courts have not awarded relief commensurate with all of the injuries suffered as a result of the discriminatory act. Until recently, courts which have reached the issue of damages have construed the Act's provisions⁵¹ fairly narrowly. In *Monroe v. Penn-Dixie Cement*

44. [1975] LAB. REL. Y.B. 413.

45. For a discussion of some of the technical problems in bringing suit under the ADEA, see Comment, *Mandatory Retirement—A Vehicle for Age Discrimination*, 51 CHI.-KENT L. REV. 116, 133-34 (1974).

46. See notes 22-25 and accompanying text *supra*.

47. 29 U.S.C. § 626(d) (1970).

48. State proceedings are deemed to commence when the complaint is filed with the state agency. See 29 U.S.C. § 633 (1970).

49. *Id.*

50. The Department of Labor has cited as a "major enforcement problem" the failure of complainants to follow proper procedures in filing private age discrimination suits. More than two-thirds of all reported suits filed in fiscal 1975 were dismissed by the district courts on procedural grounds. 91 LAB. REL. REP. (BNA) 201, 218-19 (1976).

51. 29 U.S.C. § 626 (1970) provides the remedy for a violation of the Act. That section states, in part:

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subdivision (a) thereof), and 217 of this title [these sections are part of the Fair Labor Standards Act], and subdivision (c) of this section

. . . .

Section 216(b) provides:

Any employer who violates the provisions of . . . this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages . . . and an additional amount as liquidated damages

. . . .

Corp.,⁵² the court discussed the question of damages. It found that in a case of wrongful discharge, the damage award should be equal to the amount of back pay owing to the plaintiff, from the date of discharge until the trial date, reduced by whatever benefits or other income the plaintiff had received in the interim.⁵³

One commentator has stated that "the principal relief contemplated by the Act is job restitution, rather than money damages, and private litigation is discouraged."⁵⁴ Indeed, this is an accurate description of the relief awarded under the Act prior to *Rogers*. Traditionally, courts have not recognized that the greatest injury to a victim of age discrimination may not be the loss of wages. The humiliation and psychological suffering and the sometimes resulting physical symptoms, have gone uncompensated in age discrimination cases. As a result, there has been little incentive for private suit, since the most that could be expected at the end of the long process was back-pay and reinstatement. At that point, reinstatement may be impractical or unacceptable, and the back-pay award may, in some cases, be insignificant, since it is reduced by whatever benefits or salary the individual received in the interim.⁵⁵

Since enforcement by the Secretary of Labor doesn't ap-

29 U.S.C. § 216(b) (1970). Section 626(b) continues:

Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages . . . for the purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal and equitable relief as may be appropriate to effectuate the purposes of this chapter, *including, without limitation*, judgments compelling employment, reinstatement, or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages . . . under this section

29 U.S.C. § 626(b) (1970). Subsection (c) provides for a private right of action. See note 30 *supra* for the text of subsection (c).

52. 335 F. Supp. 231 (N.D. Ga. 1971).

53. *Id.* at 234-35 (dicta). It should be noted that the concept of back-pay has been found to include seniority benefits, pension benefits, bonuses, travel expenses, moving costs, and interest. See *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1259-60, 1260 n.350 (1971) [hereinafter cited as *Developments*].

54. Agatstein, *The Age Discrimination in Employment Act of 1967: A Critique*, 19 N.Y.L.F. 309, 319 (1973).

55. *Monroe v. Penn-Dixie Cement Corp.*, 335 F. Supp. 231, 235 (N.D. Ga. 1971). For an example of greatly reduced back pay awards in a private suit, see *Bishop v. Jeleff Assocs.*, 398 F. Supp. 579, 597 (D.D.C. 1974). In that case, the minimal backpay awards were offset somewhat by a restoration of benefits to several plaintiffs whose benefits would have vested had they not been illegally discharged.

pear to be as vigorous as it could be, some incentive must be given to private individuals to encourage them to pursue their legal rights. A New Jersey district court has recently taken a step that may provide this much-needed incentive. In *Rogers v. Exxon Research & Engineering Co.*,⁵⁶ the court construed the language of the Act broadly, so as to authorize an award for pain and suffering.⁵⁷ This holding, under which an aggrieved individual can expect to be fully compensated for all the harm caused by illegal discrimination, could provide the necessary encouragement for individuals to litigate their claims.

THE ROGERS DECISION

Rogers v. Exxon Research & Engineering Co. was a private enforcement action brought by a former employee of Exxon to recover for alleged age discrimination,⁵⁸ Exxon having forced Rogers to take early retirement at the age of sixty. The court termed Dr. Rogers "a leader in his field";⁵⁹ he held two masters degrees and a Ph.D., and was a scientist and inventor of recognized merit.⁶⁰ He was the first employee to attain the position of Senior Research Associate in the Product Research Division at Exxon, and from time to time he traveled to various universities to recruit new personnel.⁶¹ He had been employed by defendant Exxon, except for a one year lapse, since 1938.⁶² Rogers' personal physician testified to a number of work-related physical conditions caused by nervous disturbance, which the court and jury found to be predictable consequences of the termination proceedings. In addition, Rogers experienced feelings of uncertainty and distrust of the dependability of his own reactions, to the point that he was afraid to drive. His physician described his symptoms as "a classical picture of an anxiety reaction or a nervous disturbance."⁶³ The court found that, as a proximate result of the defendant's illegal discrimination, Rogers experienced a syndrome of severe abdominal pain, vom-

56. 404 F. Supp. 324 (D.N.J. 1975).

57. *Id.* at 333. In a subsequent case, *Murphy v. American Motors Sales Corp.*, 410 F. Supp. 1403 (N.D. Ga. 1976), the district court relied on the broad interpretation in *Rogers* to find that punitive damages are recoverable under the ADEA.

58. After the death of Dr. Rogers in 1973, his wife and daughter continued the action as co-executrixes of his estate. 404 F. Supp. at 326.

59. *Id.* at 329.

60. *Id.*

61. *Id.*

62. *Id.* at 330.

63. *Id.* at 330 n.2.

iting and impotency.⁶⁴

After a jury verdict finding Exxon liable, the parties stipulated to out-of-pocket damages of \$30,000,⁶⁵ but, in addition, the court ruled that the plaintiff was entitled to demonstrate damages for pain and suffering inflicted by the unlawful actions of the defendant.⁶⁶ The jury returned a verdict setting the amount of compensation for pain and suffering at \$750,000.⁶⁷ The court found this amount excessive, and reduced it to \$200,000.⁶⁸

In authorizing this award, the court stated that "[i]t is the Court's view that the ADEA essentially establishes a new statutory tort. Once liability is established, therefore, the panoply of usual tort remedies is available to recompense injured parties for all provable damages."⁶⁹

Although the court found no reported case authorizing such an award under the ADEA, it noted that "[t]he suitability of compensatory awards for pain and suffering has been recognized in other discrimination contexts"⁷⁰ In particular, the *Rogers* court stated that the ADEA "may profitably be compared with Title VII of the Civil Rights Act of 1964, in both purpose and scope."⁷¹ Damages for "psychic injuries" have been awarded under Title VII by a court that held "that the purpose of the Act will best be served if all the injuries which are caused by discrimination are entitled to recognition."⁷² In a recent analysis of Title VII remedies, the Supreme Court held that Congress intended for that statute "to make persons whole for injuries suffered on account of unlawful discrimination."⁷³ The "make whole" purpose of Title VII is shared by the ADEA,⁷⁴ and merely forcing compliance with either statute does not make the victim whole.

In measuring the wrong done and ascertaining the appro-

64. *Id.* at 330.

65. *Id.* at 326.

66. *Id.* at 327.

67. *Id.*

68. *Id.* at 338.

69. *Id.* at 327.

70. *Id.* at 331. The various statutes and cases relied on by the court are discussed in the text accompanying notes 100-42 *infra*.

71. *Id.* at 328. With regard to the "profitably compared" language, see note 101 *infra*.

72. *Humphrey v. Southwestern Portland Cement Co.*, 369 F. Supp. 832, 835, (W.D. Tex. 1973), *rev'd on other grounds*, 488 F.2d 691 (5th Cir. 1974).

73. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).

74. 404 F. Supp. at 328.

priate remedy, the *Rogers* court recognized that "the most pernicious effect of age discrimination is not to the pocketbook, but to the victim's self-respect."⁷⁵ In comparison to the psychological and physiological damage done by unlawful discrimination, "the out-of-pocket loss occasioned by such discrimination is often negligible"⁷⁶ Because of various mitigating factors, such as pension benefits or other salary, the real loss may not be the out-of-pocket loss; the real loss may lie elsewhere.⁷⁷ The court found that unlawful conduct by an employer toward an older worker, such as the unlawful termination in this case, "has predictable consequences in terms of the victim's physical and emotional well-being."⁷⁸ The symptoms experienced by *Rogers*, which were clearly demonstrated to have been proximately caused by the defendant's illegal conduct, would be wholly uncompensated by an out-of-pocket award.⁷⁹

The court was careful to point out that the award of damages for pain and suffering was not punitive in purpose.⁸⁰ It "is designed solely to effect full and adequate compensation for all injuries sustained as a result of the unlawful and tortious conduct."⁸¹ The court's examination of the legislative history confirmed its view "that the Congressional purpose mandates an award of compensatory damages for pain and suffering, upon an appropriate factual showing."⁸²

The *Rogers* court summarized its ruling as follows:

[I]t is the opinion of this Court that the ADEA creates a statutory tort, and empowers the Court to employ a wide range of legal and equitable remedies in the exercise of the broad remedial discretion normally associated with actions arising from intentional torts. The Congressional history and cases decided under this and analogous civil rights statutes clearly contemplate redress of the emotional and

75. *Id.* at 329.

76. *Id.*

77. *Id.*

78. *Id.* at 330.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* The court did not further explain what is intended by "an appropriate factual showing." Depending upon the meaning given to "appropriate" by other courts, the award of compensatory damages could be either expanded or restricted. For a potential meaning of "appropriate," see text accompanying notes 89-92 *infra*.

psychological injury proved in this case by the relief awarded by the jury.⁸³

Accordingly, a court has available the full range of tort remedies in addition to the specific statutory remedies in redressing violations of the ADEA.

COMPENSATORY DAMAGES UNDER THE ADEA

Support for the result reached in *Rogers* can be drawn from various sources. Of primary importance is the legislative history and the language of the Act itself. Additionally, support for a full award of compensatory damages can be drawn from Title VII⁸⁴ and the cases interpreting that Act, even though the statutory sections authorizing remedies in the two acts differ. Finally, the courts' treatment of remedies under the early Civil Rights Acts can be used to bolster the position taken here.

The ADEA—Its Language and Legislative History

There is ample authorization for an award of compensatory damages in the legislative history of the ADEA and in the language of the Act itself. There are numerous indications in the records of debates of the Act that Congress was concerned with more than the purely economic effects of age discrimination. It was argued in the House that "although the economic loss is a serious one, the greater loss is the cruel sacrifice in happiness and well-being which joblessness imposes on these citizens and their families."⁸⁵ After pointing out that age barriers in employment are costly in a financial and social sense, one representative stated:

The financial and social costs, of course, are nothing compared with the costs in terms of human suffering and welfare which comes about as the result of discriminatory practices in employment because of age. . . . Self-esteem,

83. *Id.* at 333. Since the ADEA creates a new statutory tort, traditional tort remedies, including pain and suffering damages, are available in appropriate circumstances. *Accord*, *Murphy v. American Motors Sales Corp.*, 410 F. Supp. 1403, 1405 (N.D. Ga. 1976). This is in line with the prevailing view of the courts as to the recovery of damages for emotional distress generally, at least when intentionally caused, and with the view of the *Restatement, Torts 2d*. See Chase, *Recovery of Damages for Emotional Distress Resulting from Racial, Ethnic, or Religious Abuse or Discrimination*, 40 A.L.R. 3d 1290, 1293-94 (1971).

84. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1970).

85. 113 CONG. REC. 34,744 (1967) (remarks of Rep. Kelly, quoting President Johnson's Older American message to the Congress of January 23, 1967).

self-satisfaction, and personal security are important by-products of employment in industrial America.⁸⁶

There are numerous other references in the *Congressional Record* to the psychological side-effects of age discrimination, and it is apparent that Congress saw such effects as one of the consequences of age discrimination.⁸⁷ In addition, concern for the physical and psychological effect of unemployment on older Americans was supported by medical evidence.⁸⁸

One representative explained that the Act recognized two distinct types of unfair discrimination based on age:

[f]irst, the discrimination which is the result of misunderstanding the relationship of age to usefulness; and second, the discrimination which is the result of a deliberate disregard of a worker's value solely because of age. The results of the two types of discrimination are the same, but the remedies called for are different.

. . . .
The second type of unfair discrimination is more pernicious.⁸⁹

Representative Dwyer discussed this latter type of discrimination, the type that "consists of the blunt, blind refusal, rigid and unbending, to employ workers once they have passed an arbitrary age, however able or qualified they may be."⁹⁰ She noted that such discriminatory policy "only adds to long-term

86. 113 CONG. REC. 34,745 (remarks of Rep. Eilberg).

87. See, e.g., the House debate, where Representative Dent stated that "[T]he problem addressed by H.R. 13054 is so obvious that to belabor it is to dull it. I am talking about the *frustration and failure* many workers incur in trying to gain employment when they happen to be 40, 50 or even 60 years of age." 113 CONG. REC. 34,746 (1967) (emphasis added). Representative Hawkins recognized that employment provided "opportunities for *fulfillment, independence*, [and] . . . a *dignified* subsistence." *Id.* at 34,744 (emphasis added). It was noted by Representative Halpern that "[f]or many years our increasingly youthful society has allowed thousands of skilled and competent people to slip into a backwash of *hopelessness and despair*." *Id.* at 34,749 (emphasis added).

88. A report of the American Medical Association was referred to during the House debate which stated that "these statistics can never express the mental and physical anguish experienced

by mature workers after they have lost their jobs. However, newly announced findings by Dr. Sidney Cobb of the University of Michigan revealed that more than one-half of the men who were laid off at a Detroit plant developed significant psychological and physiological changes. A job loss, according to Dr. Cobb, frequently brings a rise in the incidence of ulcers, arthritis, and high blood pressure.

S. REP. NO. 784, 92d Cong., 2d Sess. 48 (1972).

89. 113 CONG. REC. 34,747 (1967) (remarks of Rep. Dent).

90. *Id.* at 34,752.

unemployment, high relief costs, and *extensive human suffering and despair*.⁹¹

Voluntary compliance can probably be achieved in situations involving discrimination resulting from misunderstanding, through the administrative process of conference and conciliation. It is in the second type of situation, where a deliberate discriminatory policy is followed and formal methods are necessary to achieve compliance, that an award of damages for the pain and suffering caused would appear particularly appropriate. It is difficult to imagine that Congress would so explicitly recognize the existence of a problem and then leave that problem unredressed, when the remedy was well within the scope of the proposed legislation. The language of the ADEA reflects the broad remedial purpose of Congress, and shows that Congress did not fail to provide an appropriate remedy.⁹²

Like Title VII, discussed in more detail in the following subsection, the ADEA provides for equitable remedies. These restitutionary forms of relief, *i.e.*, job restitution and back pay, are commonly awarded under both acts. But unlike Title VII, the ADEA provides for legal remedies as well. Section 626(b) of the Act states that "[i]n any action brought to enforce this chapter, the court shall have jurisdiction to grant such *legal or equitable relief* as may be appropriate to effectuate the pur-

91. *Id.* (emphasis added).

92. See note 51 *supra* for the text of the enforcement provisions. Although the ADEA incorporates the enforcement provisions of the Fair Labor Standards Act, 29 U.S.C. § 626(b) (1970), courts are not limited to the type of relief available under the FLSA in redressing ADEA violations. Until the *Rogers* decision, courts had granted awards only of back pay, since back pay is the remedy available under the incorporated provisions of the FLSA. See, *e.g.*, *Hodgson v. First Fed. Sav. & Loan Ass'n*, 455 F.2d 818 (5th Cir. 1972); *Monroe v. Penn-Dixie Cement Corp.*, 335 F. Supp. 231 (N.D. Ga. 1971) (dictum).

Legislative history indicates that the emphasis was placed on the enforcement *procedures* provided by the FLSA, not on the specific *remedies* that that Act allowed. According to a Senate report on the bill, "The investigation and enforcement provisions of the bill essentially follow those of the Fair Labor Standards Act. The enforcement provisions replace those in the original bill which were similar to the National Labor Relations Act approach." S. REP. NO. 723, 90th Cong., 1st Sess. 5 (1967).

Senator Javits explained the difference between the original Senate bill and the version eventually adopted. The original version, by calling for NLRA agency-type of enforcement, with administrative hearings prior to judicial review, "would have required the establishment within the Department of Labor of a wholly unnecessary new bureaucracy, complete with hearing examiners and regional directors, investigators and attorneys." *Id.* at 13. The bill was revised in committee, and "the enforcement techniques of the FLSA have been incorporated by reference in this bill . . ." *Id.* The emphasis seems to have been on the procedure of enforcement, not on the specific remedies the FLSA provided. See 113 CONG. REC. 31,254 (1967) (Senate debate); *id.* at 34,748 (House debate).

poses of this chapter”⁹³ Section 626(c), which provides for individual action, states similarly that “[a]ny person aggrieved may bring a civil action . . . for such *legal or equitable relief* as will effectuate the purposes of this chapter”⁹⁴

Compensatory damages have traditionally been viewed as a legal remedy. In general, compensatory damages are awarded to replace the loss caused by the wrong or injury.⁹⁵ Mental pain and suffering resulting from a wrong which in itself constitutes a cause of action is considered a proper element of compensatory damages.⁹⁶ The wrongdoer is held “liable to the person injured in compensatory damages for all of the natural and direct or proximate consequences of his wrongful act or omission.”⁹⁷

If only back pay awards were intended, there would have been no need to have provided for legal remedies, since back pay is considered restitutionary, and therefore an equitable remedy.⁹⁸ Section 626(b) enumerates certain types of relief which are available and although compensatory damages for pain and suffering are not specifically included, Congress expressly provided that its enumeration of remedies was not exclusive, by prefacing its enumeration with the language “including without limitation.”⁹⁹ Congress clearly contemplated redress of the physical and mental suffering caused by age discrimination, and provided for legal as well as equitable remedies to accomplish the remedial purpose of the Act.

Title VII

Title VII of the Civil Rights Act of 1964¹⁰⁰ provides the most profitable analogy with the Age Discrimination in Employment Act, since the ADEA was patterned closely after Title VII.¹⁰¹ Traditionally, the only monetary relief the courts

93. 29 U.S.C. § 626(b) (1970).

94. *Id.* § 626(c).

95. 25 C.J.S. *Damages* § 17 (1966).

96. *Id.* § 63; *accord*, 22 AM. JUR. 2D *Damages* § 197 (1965).

97. 25 C.J.S. *Damages* § 18 (1966).

98. *See* *Curtis v. Loether*, 415 U.S. 189, 197 (1974).

99. 29 U.S.C. § 626(b) (1970). *See* note 51 *supra* for the pertinent part of this subsection.

100. 42 U.S.C. § 2000e *et seq.* (1970).

101. The *Rogers* court states that the ADEA may be profitably compared with Title VII. 404 F. Supp. at 328. *See* *Hodgson v. First Fed. Sav. & Loan Ass'n*, 455 F.2d 818, 820 (5th Cir. 1972), where the court stated: “With a few minor exceptions the provisions of this enactment are in terms identical to those of Title VII of the Civil

have awarded under Title VII has been back pay.¹⁰² Most courts and commentators who have considered the question have taken the view that Title VII, as originally enacted, did not provide for the recovery of compensatory damages,¹⁰³ since compensatory damages have traditionally been classified as legal relief, and Title VII provided for equitable relief. However, Title VII was amended in 1972, and the provision for relief was considerably broadened. Section 2000e-5(g) now provides that

the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, *but is not limited to*, reinstatement or hiring of employees, with or without back pay, . . . or any other equitable relief as the court deems appropriate¹⁰⁴

Rights Act of 1964 except that 'age' has been substituted for 'race, color, religion, sex or national origin.' " *Accord*, *Laugesen v. Anaconda Co.*, 510 F.2d 307, 311 (6th Cir. 1975).

There is one problem with the analogy, however, that should be recognized. Commentators appear to favor an interpretation of Title VII that would allow for compensatory and even punitive damages. *See* note 105 *infra*. The courts, on the other hand, while recognizing the arguments in favor of such awards, have almost uniformly rejected them, feeling bound by the statutory language limiting relief to *equitable* relief. *See* *Loo v. Gerarge*, 374 F. Supp. 1338, 1341-42, 1341-42 nn.6&7 (D. Hawaii 1974). The language of the ADEA is not so limiting. The analogy between the two acts may be most helpful if confined to their shared purposes and scope. The difference between the provisions of the two acts was pointed out in *Murphy v. American Motors Sales Corp.*, 410 F. Supp. 1403, 1405 (N.D. Ga. 1976), where the court found the provisions of the ADEA not so limiting as Title VII.

102. *Developments*, *supra* note 53, at 1259.

103. *Richards, Compensatory and Punitive Damages in Employment Discrimination Cases*, 27 ARK. L. REV. 603, 611 (1973) [hereinafter cited as *Richards*]. The view that only back pay would be awarded was based primarily on the wording of 42 U.S.C. § 2000e-5(g) (1970). As originally enacted, that section stated, in part, "the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay." This provision was modeled after section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c) (1970). It was thought that since the NLRB traditionally restricted its monetary awards to those which could be classified as back pay, remedies under Title VII should be similarly limited. *Developments*, *supra* note 53, at 1259 n.349.

Although the wording of the NLRA is similar to that of section 2000e-5(g), NLRB rulings are not necessarily controlling in interpreting Title VII. Since the NLRB is an administrative agency, it can operate only within the confines of its statutory grant of power. A court acting under Title VII, however, could rely on its inherent judicial power to fashion an adequate remedy. *See* Comment, *Tort Remedies for Employment Discrimination under Title VII*, 54 VA. L. REV. 491, 498 n.40 (1968).

104. 42 U.S.C. § 2000e-5(g) (1974). The phrases added by the 1972 amendment are italicized.

Several commentators have recognized the need for and appropriateness of compensatory relief under Title VII.¹⁰⁵ In an article written before the 1972 amendment, one author stressed the importance of individual relief to effective enforcement of Title VII,¹⁰⁶ and suggested that "[s]pecific statutory authority is not an essential prerequisite to the existence of power in federal courts to grant relief in damages to enforce the object and purpose of a particular statute."¹⁰⁷ In another pre-amendment article, the author stated that the ineffectiveness of the private action derives primarily from the inadequacy of remedies available to an aggrieved individual.¹⁰⁸ He noted the remedial scheme "completely ignores some types of injuries which result from discrimination by an employer,"¹⁰⁹ specifically psychological injuries, and suggested the granting of tort remedies "as a supplement to the limited relief provided by the statute"¹¹⁰

A more recent article considered the effect of the 1972 amendment on Title VII's remedial scheme.¹¹¹ The author argues that the amended section 2000e-5(g) should be interpreted to allow the recovery of compensatory damages. He relies on the legislative history of the amendment, which indicates that the dominant purpose of Congress was to put plaintiffs in the position where they would have been were it not for the unlawful discrimination.¹¹² This language is "the classic statement of the principle underlying compensatory damages."¹¹³

105. See, e.g., Richards, *supra* note 103; *Developments, supra* note 53 (this article favors an award of punitive damages rather than compensatory damages); Comment, *Title VII of the 1964 Civil Rights Act—A Prayer for Damages*, 5 CAL. W.L. REV. 252 (1969); Note, *Tort Remedies for Employment Discrimination under Title VII*, 54 VA. L. REV. 491 (1968).

106. Comment, *Title VII of the 1964 Civil Rights Act—A Prayer for Damages*, 5 CAL. W.L. REV. 252 (1969).

107. *Id.* at 260.

108. Comment, *Tort Remedies for Employment Discrimination Under Title VII*, 54 VA. L. REV. 491, 492 (1968).

109. *Id.* at 493.

110. *Id.* at 497.

111. Richards, *supra* note 103.

112. *Id.* at 613 (citing 118 CONG. REC. 7168 (1972)).

113. *Id.* at 613. See also 25 C.J.S. *Damages* § 63 (1966). *Id.* at n.40 states: "Where an allowance is made for mental pain and suffering, it is an element of actual or compensatory, as distinguished from exemplary or punitive damages [The] basic objective of damages for injuries to feelings is to make the injured party whole" Although the statute uses the term "equitable relief" and "affirmative action," the author believes that, in view of the clearly expressed purpose of the Act, it is probable

With one exception, courts have found that compensatory damages for mental suffering are not available under Title VII.¹¹⁴ In that case, *Humphrey v. Southwestern Portland Cement Co.*,¹¹⁵ damages for mental distress were awarded. After evidence of mental distress was received, the court noted that the psychic harm which might accompany an act of discrimination might be greater than would first appear.¹¹⁶ The court then summarized the characteristics of discrimination which required the availability of such damages to provide complete relief to injured parties:

[t]he loss of a job because of discrimination means more than the loss of just a wage Discrimination is a vicious act. It may destroy hope and any trace of self-respect.

that Congress used the terms in a popular rather than a legal sense. Richards, *supra* note 103, at 613.

The meaning of the amended section was explained to Congress as follows:

The provisions of this subsection are intended to give the courts wide discretion in exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of the relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.

118 CONG. REC. 7168 (1972). The Senate report on the amendment expressed similar intent: "The provision is intended to give the Commission wide discretion in fashioning the most complete relief possible to eliminate all of the consequences of the unlawful employment practice caused by, or attributable to, the respondent." S. REP. NO. 415, 92d Cong., 1st Sess. 38 (1972).

Since the ADEA and Title VII share the purpose of making the victim whole, it can be argued that the wide discretion Congress intended the courts to use in providing a remedy under Title VII should also be available under the ADEA. Although the purpose of the two acts is the same, the remedies provided are different in nature. See text accompanying notes 120-22 *infra*.

114. On the other hand, there has been some recognition of the psychological damage that may result from discrimination. In *Rogers v. Equal Employment Opportunity Comm.*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972), the court stated: "We must be acutely conscious of the fact that Title VII of the Civil Rights Act of 1964 should be accorded a liberal interpretation in order to effectuate the purpose of Congress to eliminate the inconvenience, unfairness, and humiliation of ethnic discrimination." *Id.* at 238. It was the court's belief that "employees' psychological as well as economic fringes are statutorily entitled to protection." *Id.* at 238. This court did not reach the issue of damages.

115. 369 F. Supp. 832 (W.D. Tex. 1973), *rev'd on other grounds*, 488 F.2d 691 (5th Cir.), *rehearing denied*, 490 F.2d 992 (5th Cir. 1974). This case was decided under Title VII as originally enacted.

116. 369 F. Supp. at 834.

That, and not the loss of pay is perhaps the injury which is felt the most, and the one which is the greatest.¹¹⁷

The court concluded that the purpose of the Act would best be served if all of the injuries which result from discrimination were entitled to recognition.¹¹⁸ The court in *Humphrey* recognized that Title VII suits are primarily suits in equity, but held that in an appropriate case, legal remedies may also be awarded.¹¹⁹

Most decisions which have rejected claims for compensatory damages under Title VII have done so primarily on statutory grounds which are inapplicable to the ADEA. The statutory language referred to is contained in section 2000e-5(g): "The court may . . . order . . . any other equitable relief as the court deems appropriate."¹²⁰ The ADEA, on the other hand, expressly provides for legal as well as equitable relief. Section 626(b) provides, in part, "the court shall have jurisdiction to grant such legal and equitable relief as may be appropriate"¹²¹ The Title VII decisions which have denied compensatory damages have done so on the grounds that "[t]he statutory language makes clear that only *equitable* relief may be granted under §2000e-5(g), and punitive and compensatory damages have traditionally been classified as legal relief."¹²²

117. *Id.*

118. *Id.* at 835.

119. The *Humphrey* court stated that although Title VII suits were primarily suits in equity, in an appropriate case legal remedies could be awarded without detracting from the equitable basis of the suit. *Id.* at 842. In support of this proposition the court cited 1 J. POMEROY, *EQUITY JURISPRUDENCE* § 237d (5th ed. 1941) in which the author notes:

It may be stated, therefore, as a general proposition, that a court of equity declines the jurisdiction to grant mere compensatory damages, when they are not given in addition to or as an incident of some other special equitable relief, unless under special circumstances the exercise of such jurisdiction may be requisite to promote the ends of justice.

In this case, the court found it could only "promote the ends of justice" by granting the requested relief (compensatory damages for psychic injuries). 369 F. Supp. at 843.

120. 42 U.S.C. § 2000e-5(g) (1974).

121. 29 U.S.C. § 626(b) (1970).

122. *Loo v. Gerarge*, 374 F. Supp. 1338, 1341 (D. Hawaii 1974); *accord*, *Van Hoomissen v. Xerox Corp.*, 368 F. Supp. 829, 836 (N.D. Cal. 1973).

Although the court in *Loo* disallowed a claim for compensatory damages, it stated that the statute could be interpreted so as to make such damages available. 374 F. Supp. at 1341 n.6.

Some courts have taken a fairly narrow view of the purpose of Title VII, and have denied recovery of damages on the ground that the statute is primarily intended to correct a serious public problem, and the compensation of private grievances is only a secondary concern. *Development*, *supra* note 53, at 1261.

Courts have recognized the need for compensatory damages under Title VII, but have felt restrained by the language of that Act and have not made such awards.¹²³ The ADEA imposes no such restrictions on the discretion of the courts in fashioning appropriate remedies.¹²⁴ It seems likely, therefore, that courts which have not granted compensatory relief under Title VII based on the language limiting the remedy to equitable relief would make such an award under the ADEA. The wide discretion Congress intended the courts to use in providing the most complete relief possible to victims of discrimination¹²⁵ has been further broadened by the ADEA's provision for legal as well as equitable relief.¹²⁶

The Civil Rights Acts

The appropriateness of compensatory damages awards for pain and suffering has been recognized by the courts in other discrimination contexts, where the statutory protection has been found to create a new legal duty and therefore a new tort. It is well established that compensatory damages are available under sections 1981 and 1982 of the Civil Rights Act statutes,¹²⁷ despite the fact that neither of those sections expressly provides for such a remedy.¹²⁸ In *Sullivan v. Little Hunting Park*,

Another judicial view is that private suits were intended to play only a limited role within the scope of Title VII, such suits being merely a means to an end in accomplishing the purpose of the Act. *Jiron v. Sperry Rand Corp.*, 10 FEP Cases 730, 739 (D. Utah 1975). Other courts have not adopted so narrow a view. *See, e.g., Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969). In *Bowe* the court stated: "The clear purpose of Title VII is to bring to an end the proscribed discriminatory practice and to make whole, in a pecuniary fashion, those who have suffered by it." *Id.* at 720 (emphasis added).

The former view may be unnecessarily narrow. One commentator has noted that, although as originally conceived, Title VII would primarily have established a 'public right,' and only incidentally created a private one, the orientation of the Act changed from public rights to private remedies during the numerous compromises which preceded its passage. Comment, *Enforcement of Fair Employment Under the Civil Rights Act of 1964*, 32 U. CHI. L. REV. 430, 432, 467 (1965).

123. See note 101 *supra*.

124. See notes 120-21 and accompanying text *supra*. See also *Murphy v. American Motor Sales Corp.*, 410 F. Supp. 1403, 1405 (N.D. Ga. 1976), where the court stated that "Title VII is distinguishable from the Age Act in this regard inasmuch as relief under Title VII is limited to equitable remedies, whereas the Age Act provides for both equitable and legal relief."

125. See note 113 *supra*.

126. See 29 U.S.C. § 626(b), (c) (1970).

127. 42 U.S.C. §§ 1981-82 (1970).

128. *Id.* § 1981 provides:

All persons within the jurisdiction of the United States shall have the

Inc.,¹²⁹ an action was brought under sections 1981 and 1982 for injunctive relief and monetary damages. The Supreme Court considered the question of what damages, if any, might appropriately be recovered for a violation of those sections. The Court likened the problem to the situation presented in *Bell v. Hood*,¹³⁰ where suit was brought for alleged violations of the fourth and fifth amendments. In both cases, federal statutes provided protection for certain rights, but did not, by their terms at least, provide any remedy. In *Bell*, the Court ruled that

[w]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.¹³¹

The *Sullivan* court relied on *Bell* in holding that "[t]he existence of a statutory right implies the existence of all necessary and appropriate remedies."¹³²

same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind and to no other.

Id. § 1982 provides:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

129. 396 U.S. 229 (1969).

130. 327 U.S. 678 (1946).

131. *Id.* at 684.

132. 396 U.S. at 239. The Court went on to say that compensatory damages for deprivation of a federal right are governed by federal standards. *Id.* at 239. The "federal standards" referred to are provided in 42 U.S.C. § 1988 (1970). That section provides:

The jurisdiction in civil . . . matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against the law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil . . . cause is held, so far as the same is not inconsistent with the constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . .

Following *Sullivan*, courts have awarded damages for mental suffering, humiliation and embarrassment under the Civil Rights Act statutes.¹³³ Such an award has been made under section 1983¹³⁴ as well, on the theory that the civil rights statutes "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."¹³⁵

The same result could be reached under the ADEA. The pain and suffering demonstrated in *Rogers* is, in many cases, a "natural consequence" of discriminatory action. The ADEA creates a right to be protected against age discrimination much the same as the Civil Rights Act protects against racial discrimination, and, in the language of *Sullivan*, "the existence of a statutory right implies the existence of all necessary and appropriate remedies."¹³⁶ If this language can support an award of compensatory damages where no remedy was specifically provided by statute, it could likewise support the same award

The *Sullivan* court interpreted this section to mean that both federal and state rules on damages may be utilized, whichever best serves the policies expressed in the federal statutes. 396 U.S. at 240.

133. See, e.g., *McCrary v. Runyon*, 515 F.2d 1082 (4th Cir. 1975) (applying 42 U.S.C. § 1981); *Seaton v. Sky Realty Co.*, 491 F.2d 634 (7th Cir. 1974) (applying 42 U.S.C. §§ 1982, 3212); accord *Williams v. Matthews Co.*, 499 F.2d 819, 821 (8th Cir.), cert. denied, 419 U.S. 1021, 1027 (1974); *Walker v. Fox*, 395 F. Supp. 1303 (S.D. Ohio 1975); *McNeil v. P-N & S Co.*, 372 F. Supp. 658 (N.D. Ga. 1973) (applying 42 U.S.C. §§ 1982, 3604(a),(d)); *Hernandez v. Erlenbusch*, 368 F. Supp. 752 (D. Ore. 1973) (applying 42 U.S.C. § 1981); *Gonzalez v. Fairfax-Brewster School, Inc.* 363 F. Supp. 1200 (E.D. Va. 1973) (applying 42 U.S.C. § 1981). Cf., *Lazard v. Boeing Co.*, 322 F. Supp. 343, 345-346 (E.D. La. 1971) (discussion of remedies available under 42 U.S.C. § 1981).

134. 42 U.S.C. § 1983 (1970), which states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

135. *Monroe v. Pape*, 365 U.S. 167, 187 (1961); accord, *Pierson v. Ray*, 386 U.S. 547, 556 (1967); *Jones v. Rundle*, 453 F.2d 147, 150, n.11 (3d Cir. 1971). See, e.g., *Donovan v. Reinbold*, 433 F.2d 738 (9th Cir. 1970) (compensatory damages under 42 U.S.C. § 1983). Cf. *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 517 F.2d 1141, 1143 (4th Cir. 1975) (finding tort liability under 42 U.S.C. §§ 1981-82).

136. 396 U.S. at 239. It might be argued that the reasoning of *Bell v. Hood*, 327 U.S. 678, 684 (1946), quoted in *Sullivan* is applicable only where, as in 42 U.S.C. §§ 1981-83, the statute does not explicitly provide for a remedy, and that it is inapplicable where a remedy is provided, as in the ADEA. It should be noted, however, that the same language of *Bell v. Hood* was recently quoted by the Supreme Court in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). *Albemarle* was an action brought under Title VII, which, like the ADEA, contains provisions for a remedy.

under the ADEA, where legal remedies are expressly allowed.¹³⁷

Compensatory damages are also awarded under the Fair Housing Act, Title VIII of the Civil Rights Act of 1968.¹³⁸ The Supreme Court has held that an action under Title VIII "sounds basically in tort—the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach."¹³⁹ In *Steele v. Title Realty Co.*,¹⁴⁰ the court stated that damages in housing discrimination cases are not limited to out-of-pocket losses, but may include an award for emotional distress and humiliation.¹⁴¹ Although temperate conduct may be considered as a mitigating circumstance in determining damages, the right to recover for the humiliation and emotional distress suffered was held to exist even though "the discrimination was perpetrated in a courteous manner, and was not vindictive or abusive."¹⁴²

Thus, compensatory damages for pain and suffering or mental distress have been held to be available not only where the statute expressly provides for actual damages, but also where it fails to do so. Like Title VIII, the ADEA defines a "new legal duty," and like Title VIII, the ADEA authorizes compensatory damages by providing for legal relief. It should not be necessary to imply the right to compensatory damages under the ADEA. The Civil Rights Act cases which have done so only lend greater support to the recognition that pain and suffering are a "natural consequence" of discrimination.

CONCLUSION

Litigation under the ADEA is only now entering the recovery stage. Few courts have yet reached the issue of damages under the Act; the interpretation the courts choose to give the enforcement provisions of the Act will be determinative of its success in combating age discrimination. Central to the issue of damages is the recognition that much of the effectiveness of

137. 29 U.S.C. § 626 (1970).

138. 42 U.S.C. §§ 3601-19, 3631 (1970).

139. *Curtis v. Loether*, 415 U.S. 189, 195 (1974). It should be noted that 42 U.S.C. § 3612(c) expressly authorizes an award of actual damages. That section provides, in part: "The court may . . . award to the plaintiff actual damages and not more than \$1000 punitive damages . . ."

140. 478 F.2d 380 (10th Cir. 1973).

141. *Id.* at 384; *accord*, *Jeanty v. McKey & Poague, Inc.*, 496 F.2d 1119, 1121 (7th Cir. 1974); *Stevens v. Dobs, Inc.*, 373 F. Supp. 618 (E.D.N.C. 1974).

142. 478 F.2d at 384.

the ADEA will be dependent upon the initiative of the complainant. Since vigorous enforcement by the Secretary of Labor is lacking, complainants must be encouraged to pursue correction of prohibited practices through individual private suit. Offering compensation for all of the injuries sustained would provide this encouragement.¹⁴³

The legislative history and the language of the ADEA provide solid support for compensatory damage awards. Although courts are hindered in providing complete redress of injuries under Title VII by the language of the statute, there is no such obstacle in the ADEA. The language of the Act in fact compels such a result since Congress expressly provided for legal as well as equitable relief under the Act. Given the broad language of the statute, "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."¹⁴⁴

The decision in *Rogers* indicates that at least one court has recognized the importance of adequate compensation of individuals in ensuring the effectiveness of the ADEA. There is a need for vindication of individual rights at the same time a public wrong is remedied. The competency of the district courts in confronting the complexities of anti-discrimination statutes and in resolving the troublesome issues that arise in their practical implementation has been recognized in the context of Title VII.¹⁴⁵ A full explication of the scope of the statute can be achieved only through the process of litigation. There is no reason that the courts should not exhibit the same expertise and independence in enforcing the ADEA. The most effective incentive that can be offered is found in strong and effective remedies to redress individual grievances.¹⁴⁶ The *Rogers* court has provided such incentive by allowing recovery for all of the harm caused by discrimination. Not only is an award of compensatory damages appropriate in the context of the Act, it is consistent with relief in other discrimination cases.

Peggy Springgay

143. See Comment, *Title VII of the Civil Rights Act—A Prayer for Damages*, 5 CAL. W.L. REV. 252, 259 (1969) for a similar argument in relation to Title VII.

144. *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1969).

145. *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974). See also, S. REP. NO. 415, 92d Cong., 1st Sess. 86-87 (1972) (views of Mr. Dominick).

146. See Comment, *A Survey of Remedies Under Title VII*, 5 COLUM. HUMAN RIGHTS L. REV. 437, 437-38 (1973) (considering Title VII remedies).